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No. 06-313
(Capital Case)

IN THE

Supreme Court of the United States

DONALD P. ROPER,
Superintendent, Polosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* INTERESTED FORMER OKLAHOMA CITY BOMBING PROSECUTORS IN SUPPORT OF RESPONDENT

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February 26, 2007

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former prosecutors who have handled capital cases and who have a continuing interest in the fair and effective functioning of the criminal justice system, both as a means to punish the guilty and to protect the innocent. *Amicus* Aitan D. Goelman served for nine years as a federal prosecutor with the U.S. Department of Justice. Mr. Goelman was a member of the Oklahoma City Bombing Task Force, and he was a trial prosecutor in the cases against Timothy McVeigh and Terry Nichols. *Amicus* Larry A. Mackey served for three years as a state prosecutor and eighteen years as a federal prosecutor. Mr. Mackey was also a member of the Department of Justice's trial teams for the cases against Timothy McVeigh and Terry Nichols, and he delivered the prosecution's closing argument in *United States* v. *Timothy McVeigh*. *Amicus* Beth A. Wilkinson is also a former federal prosecutor who was on the Department of Justice's trial teams for the cases against Timothy McVeigh and Terry Nichols, and who gave the sentencing-phase summation in *United States* v. *Timothy McVeigh*.

Amici believe that maintaining the "special role" of the prosecutor is a critical component of an effective criminal justice system. *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999). In this special role, prosecutors are vigorous advocates for the government—but advocates who recognize that the government's fundamental interest in any criminal case "is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). As such, prosecutors have a unique duty stemming both from the

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

Constitution and from the traditions of the office to refrain from improper arguments that might lead a jury to base its decisions on emotion, caprice, or a misplaced trust in the prosecutor as representative of the government. This Court has clearly established that such arguments are improper, and its holdings have given prosecutors unequivocal and long-standing guidance about the appropriate bounds of advocacy. *Amici* submit that the Court should reaffirm that guidance here.

SUMMARY OF ARGUMENT

This case addresses a question that the *amici* are surprised to see. *Amici* are aware of a longstanding and broad body of cases prescribing the appropriate boundaries of argument for prosecutors, whose position of special authority carries significant weight and duties of fairness. *Amici* and other prosecutors understood this Court's caselaw as providing clear guidance about the appropriate scope of argument, both in ordinary closing arguments and in capital sentencing arguments.

The Court's numerous holdings in this area have identified several categories of argument as plainly impermissible. A prosecutor may not offer his or her personal opinions or otherwise encourage the jury to rely on the prosecutor's judgment instead of their own. In the same vein, prosecutors may not admonish jurors to "do their duty" or the like. Inflammatory and emotional arguments are similarly out of bounds. And, a prosecutor in a capital sentencing proceeding may not make arguments that could lead the jury to misunderstand its responsibility for the sentencing decision.

In addition, this Court's decisions have clearly established rules for courts to evaluate the prejudice from an improper argument. Courts must consider the overall context of the misconduct to determine the likelihood that the jury's decision was affected by the misconduct.

ARGUMENT

THIS COURT HAS GIVEN PROSECUTORS CLEAR GUIDANCE ON THE SCOPE OF PROPER ARGUMENT.

Every federal and state prosecutor in the United States has been entrusted with a "special role . . . in the search for truth in criminal trials." *Strickler*, 527 U.S. at 281. This special role "transcends that of an adversary," *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985), for a prosecutor's duty is "to seek justice, not merely to convict." Am. Bar Ass'n, *Standards for Criminal Justice: Prosecution Function and Defense Function* § 3-1.2(c) (3d ed. 1993) (hereafter "*ABA Standards*"); see also ABA Model R. 3.8 cmt. [1] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."). In short, prosecutors "represent not an ordinary party but We the People." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 651 (1974) (Douglas, J., dissenting).

In part because of this special role, a prosecutor's misconduct in argument has a significant potential to undermine the administration of justice. While both prosecutors and defense counsel have an ethical duty to refrain from improper and inflammatory arguments, prosecutors have a special responsibility in light of both the inherent power of their office and their commitment "to seek justice, not merely to convict." *ABA Standards* § 3-1.2(c). The natural respect and credence that most jurors will afford the government's representative means that improper statements and arguments by a prosecutor carry a high likelihood of unfair prejudice to a defendant. Instances of misconduct also adversely reflect on the office and on the vast

majority of prosecutors who conscientiously adhere to ethical standards. Such transgressions risk undermining public confidence in the criminal justice process.

For these reasons, this Court repeatedly has warned prosecutors not to stray beyond the appropriate bounds of argument, and it has long recognized the danger of unfair prejudice from improper prosecution argument. This Court's body of cases in the area has created a "clearly established Federal law" that both guides federal and state courts and gives clear instruction to federal and state prosecutors.

A. This Court's Holdings Clearly Establish What Prosecutorial Arguments Are Inappropriate.

For over a century, this Court has recognized that improper argument by a prosecutor can be "prejudicial to the accused." *Dunlop* v. *United States*, 165 U.S. 486, 498 (1897); cf. *Williams* v. *United States*, 168 U.S. 382, 398 (1897) (holding that prosecutor's comment on proffered testimony in open court was "highly improper" and "tended to prejudice the rights of the accused to a fair and impartial trial"). Contrary to Petitioner's crabbed view of the applicable caselaw,[2] there exists a broad body of cases in which this Court has established clear rules defining both what prosecutors may and may not argue and how courts should assess the prejudice from improper arguments. Below *amici* summarize the most important cases in which the Court developed this "clearly established Federal law." 28 U.S.C. § 2254(d)(1).

This Court's first detailed consideration of improper prosecution argument was in *Berger* v. *United States*, 295 U.S. 78 (1935). This Court reversed the *Berger* petitioner's conviction for conspiracy to issue counterfeit money, holding

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[2] Petitioner makes the mystifying assertion that the only "'clearly established Federal law' applicable to [Respondent's] claim is set forth in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994)." Pet. Br. at 20. As the discussion below indicates, this is simply incorrect.

that the prosecutor had acted inappropriately both in his cross-examination of witnesses and in his closing argument. The Court held that the prosecutor's closing argument "contain[ed] improper insinuations and assertions"—the most prejudicial of which was the implication that his position made him privy to special knowledge of facts not in the record that supported conviction. *Id.* at 85. Namely, the prosecuting attorney argued that he "'knew'" that a witness could have identified Berger, and that her failure to do so on the witness stand was the result of "'complicated . . . rules of the game'" that precluded the prosecutor from eliciting this testimony. *Id.* at 86-87.[3]

The *Berger* court found this sort of misconduct to be particularly inappropriate because "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 88. The respected position that a prosecutor holds makes it all the more likely that a prosecutor's misconduct will have an prejudicial effect on the average jury. See *id.* ("Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."). For these reasons, this Court reversed Berger's conviction, finding it "highly probable" that this misconduct prejudiced the accused. *Id.* at 89.

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), a prosecution under the Sherman Act for price-fixing, this Court considered a different species of improper

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[3] his Court similarly condemned the prosecutor's *ad hominem* attacks on defense counsel. *See Berger*, 295 U.S. at 86 ("'But, oh, they can twist the questions, . . . they can sit up in their offices and devise ways to pass counterfeit money; "but don't let the Government touch me, that is unfair; please leave my client alone."'" (omission in original)).

argument—inflammatory characterizations of the defendant and claims that the jury had a duty to the community to convict. *Id.* at 238-40. This Court condemned the "appeals to class prejudice" in the prosecutor's closing argument—which included references to "malefactors of great wealth" and "eager, grasping men"—holding that such statements were "undignified and intemperate." *Id.* at 238-39. The Court concluded, however, that such statements were but "minor aberrations in a prolonged trial" and unlikely to influence the minds of the jurors. *Id.* at 239-40. This Court reached the same conclusion about the prosecutor's assertions of personal belief "'in the justice of the cause . . . espouse[d] here,'" and his "plea to the jury not to 'let your Government and the United States and its citizens and society down.'" *Id.* at 240. While such comments were "highly improper," they were only "isolated, casual episodes in a long summation of over 200 printed pages" and did not prejudice the jury. *Id.* at 242.

In *Viereck* v. *United States*, 318 U.S. 236 (1943), this Court again held that a prosecutor's inflammatory rhetoric and appeals to the jury's "duty" to convict could prejudice a defendant's right to a fair trial. *Viereck* was an appeal from a prosecution for failure to register as a agent of foreign principals, brought against an individual who had represented German principals. See *id.* at 239. In closing the prosecutor admonished the jurors that "'[t]his is war, harsh, cruel, murderous war'" and went on to analogize the jurors' duties to the duties of soldiers in combat[4] and to exhort the jurors to "'do your duty.'"[5] This Court found that these remarks were an emotional appeal to "passion and prejudice" that should

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[4] *Viereck*, 318 U.S. at 247 n.3 ("'The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime, just as much as they are relying upon the protection of the Men who man the guns in Bataan Peninsula, and everywhere else.'").

[5] *Viereck*, 318 U.S. at 247 n.3 ("'You have a duty to perform here. As a representative of your Government I am calling upon every one of you to do your duty.'").

have been stopped by the trial judge *sua sponte*, and that the remarks prejudiced the defendant's right to a fair trial. *Id.* at 247-48 & n.3.

This Court again addressed the question of improper prosecution argument in *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974). The only misconduct alleged in *Donnelly* was a single remark in closing argument suggesting that the defendant hoped for a conviction on a lesser offense (and not for acquittal), a remark which the jury was specifically instructed to disregard. See *id.* at 640-41. Under the circumstances this Court found that these "few brief sentences in the prosecutor's long and expectably hortatory closing argument" were not so prejudicial as to lead to a denial of constitutional due process. *Id.* at 647-48. But the Court reaffirmed its disapproval of this sort of prosecutorial misconduct and noted that some instances of misconduct "may be too clearly prejudicial for . . . a curative instruction to mitigate their effect." *Id.* at 644, 648 n.23.

In *United States* v. *Young*, 470 U.S. 1 (1985), this Court again decried a prosecutor's reference to his personal opinion and the attendant implication that the prosecutor's position gave him an authoritative and trustworthy perspective. Such advocacy "has no place in the administration of justice and should neither be permitted or rewarded." *Id.* at 9. The *Young* prosecutor told the jury in closing argument that his "personal impression" was that the defendant was guilty of fraud. *Id.* at 5. The Court noted that such statements "pose two dangers": (1) the danger that the jury would presume that the prosecutor was aware of evidence demonstrating guilt that was not presented to the jury, and (2) the danger that the jury might "trust the Government's judgment rather than its own view of the evidence." *Id.* at 18-19. In addition, this Court condemned the prosecutor's "exhort[ation] [of] the jury to 'do its job,'" holding that "that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice." *Id.* at 18. The Court

found, however, that these instances of prosecutorial misconduct did not unfairly prejudice defendant, largely because they responded to defense counsel's equally improper claim that none of the prosecutors believed the defendant was guilty. See *id.* at 4-5, 18-19. The Court also reasoned that prejudice from the improper remarks was unlikely in light of the "overwhelming," "substantial and virtually uncontradicted evidence" of the defendant's guilt. *Id.* at 19-20.

Caldwell v. *Mississippi*, 472 U.S. 320 (1985), first applied this Court's jurisprudence on prosecutorial argument in the context of a capital sentencing proceeding, holding that an argument that improperly lessened the jury's sense of responsibility for sentencing required reversal of the petitioner's death sentence. In his penalty-phase rebuttal argument, the prosecutor in *Caldwell* informed the jury that "your decision is not the final decision" because "the decision you render is automatically reviewable by the Supreme Court." *Id.* at 325-26. This Court found this argument to be "clearly improper," because the "uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333. This error was so prejudicial to warrant reversal of petitioner's death sentence, particularly in light of the fact that there was no corrective instruction. *Id.* at 339.[6]

In *Darden* v. *Wainwright*, this Court reviewed another prosecution closing argument in a death-penalty case, this time at the guilt-innocence phase. The Court held that the prosecutor's inflammatory emotional appeals and belligerent

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[6] In light of *Caldwell*, petitioner's assertions in its question presented that this court has never "held a prosecutor's penalty phase closing argument to violate due process" or articulated any "standard of error and prejudice" for penalty phase claims are simply incorrect. Pet. Br. i. This Court should consider dismissing the writ of certiorari as improvidently granted.

castigation of the defendant "deserved . . . condemnation." 477 U.S. 168, 179 (1986). Among other objectionable remarks, the *Darden* prosecutor "made several offensive comments reflecting an emotional reaction to the case," including references to the defendant as an "animal" and wishes that the defendant had been killed already or had committed suicide. *Id.* at 180 & nn.11-12. The *Darden* Court found such comments to be "undoubtedly" improper. *Id.* at 180. However, the Court found that these improper comments did not deprive the defendant of a fair trial, in part because of "the overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges." *Id.* at 182 (internal quotation marks omitted). This Court noted that *Darden* presented markedly distinct circumstances than *Caldwell*, in part because the comments in *Caldwell* were made at the sentencing phase while those in *Darden* were made at the guilt-innocence phase—one in which "overwhelming" evidence of guilt was presented. 477 U.S. at 183 n.15.[7]

B. This Court's Holdings Have "Clearly Established Federal Law" Relating To Prosecutorial Arguments.

From *Berger* to *Darden*, this Court has drawn, sharply and distinctly, the proper boundaries of prosecutorial arguments. *Amici* have no doubt that this is—and was—a "clearly established Federal law" that guides prosecutors and courts

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[7] While *amici* have endeavored to summarize this Court's most significant jurisprudence about prosecutorial argument, this brief does not exhaustively chronicle every case in which this Court has discussed the issue. For instance, several of this Court's decisions addressing the effect of a prosecutor's comment on a defendant's silence present analytically distinct issues and therefore have not been discussed in detail. *See, e.g.*, *United States* v. *Hasting*, 461 U.S. 499, 510-11 (1983); *Fontane* v. *California*, 390 U.S. 593, 596 (1968); *Anderson* v. *Nelson*, 390 U.S. 523, 525 n.*, 526-28 (1968); *Chapman* v. *California*, 386 U.S. 18, 25-26 (1967).

nationwide. 28 U.S.C. § 2254(d)(1). In very specific terms, the Court has made plain the impermissibility of at least five different types of arguments. *First*, beginning in *Berger*, this Court established that a prosecutor may not make arguments that exploit the natural respect and credence that a jury will give a prosecutor. Such impermissible arguments include those that offer the prosecutor's personal opinions, see *Young*, 470 U.S. at 5; *Socony-Vacuum*, 310 U.S. at 240; *Berger*, 295 U.S. at 85-86, and those that allude to the prosecutor's position in a way that encourages jurors to rely on the prosecutor's opinions instead of their own. See *Viereck*, 318 U.S. at 247-48 & n.3; *Socony-Vacuum*, 310 U.S. at 240.

Second, this Court has disapproved arguments designed to rouse "passion and prejudice" against the defendant, whether those arguments are inflammatory characterizations of the defendant, see *Darden*, 477 U.S. at 180 & nn.11-12; *Donnelly*, 416 U.S. at 640-41; *Socony-Vacuum*, 310 U.S. at 238-40, personal attacks on defense counsel, see *Berger*, 295 U.S. at 86, 88, or other emotional appeals. See *Darden*, 477 U.S. at 180 & nn. 9-12.

Third, prosecutors may not admonish jurors that supporting the government's position is "their duty" to the government or to the community. See *Young*, 470 U.S. at 18; *Viereck*, 318 U.S. at 247-48 & n.3. A jury's duty is to render a verdict based on the evidence, not to favor a particular side. The same rule applies in the special context of a capital sentencing proceeding, where the jury's duty is to prescribe a sentence that is appropriate in light of all the relevant considerations, not to honor the government's wishes or to protect society.

Fourth, and relatedly, the prosecution may not analogize the jury's role to that of soldiers in wartime, an analogy that could lead jurors to conclude that their responsibility is to follow instructions or to defend the community—and not to

exercise their independent judgment. See *Viereck*, 318 U.S. at 247-48 & n.3.[8]

Fifth, this Court has established that prosecutors must not make arguments that could lead the jury to minimize the importance of its role in a death penalty sentencing. See *Caldwell*, 472 U.S. at 333.

These clearly established holdings cannot be cabined in such a way that they forbid only the specific phrases uttered by the prosecutors in the cases reviewed by this Court. As explained, they set forth standards barring defined categories of impermissible arguments. For example, *Caldwell* certainly establishes that a prosecutor may not instruct a jury that its decision "is not the final decision" on the death penalty, but it also establishes—in equally plain terms—that prosecutors may not make any other arguments that would lead the jury "to minimize the importance of its role." So too, *Berger*'s admonition that prosecutors may not exploit their position by asserting their personal opinions is not limited to the *Berger* facts (assertions about what a witness would have really testified to), but represents instead a more general bar on all arguments implying that the prosecutor has special knowledge or authority that ought to be obeyed.

Amici do not now and never before understood that the rules this Court has prescribed for closing arguments in non-death penalty cases do not apply with equal or greater force to sentencing-phase arguments in capital cases. A prosecutor's injection of personal opinion or inflammatory rhetoric is as objectionable in a sentencing argument as it is in an ordinary closing argument, and it is difficult to imagine that either a court or a prosecutor would reasonably conclude that the ordinary restrictions on prosecutorial argument somehow do

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[8] *Amici* note that some of the statements at issue in this case are strikingly similar to the *Viereck* prosecutor's argument that the jury's duty to convict was like that of soldiers on the battlefield. *See Weaver* v. *Bowersox*, 438 F.3d 832, 836 (8th Cir. 2006).

not apply in a sentencing argument. Certainly capital cases—especially in the penalty phase—are emotional events. But that is all the more reason to take care to avoid precisely the types of impassioned appeals that this Court has prohibited. Wholly legitimate emotions can be expressed through the facts and the victim-impact witnesses. There is no place—and should be no need—for prosecutorial embellishment through personal or inflammatory remarks.

In addition, this Court has established straightforward guidelines for courts to assess the prejudice from any improper prosecutorial argument. In general, the prejudicial effect of prosecutorial misconduct must be judged in light of the context of the remarks. Important considerations include whether the misconduct was an isolated comment or part of a pattern of improper arguments,[9] whether the misconduct was a response to similar comments by defense counsel,[10] and whether the trial court mitigated any prejudice through a curative instruction.[11] And perhaps the most important factor is whether it is reasonably possible that the misconduct affected the jury's decision. Where the prosecution's evidence is overwhelming, it is unlikely that an improper argument could affect the jury's ultimate verdict. See *Darden*, 477 U.S. at 182; *Young*, 470 U.S. at 19-20. But where the case is a close one, prosecutorial misconduct may well tip the balance toward conviction. See *Berger*, 295 U.S. at 89.[12]

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[9] *Compare Donnelly*, 416 U.S. at 640-41, *and Socony-Vacuum*, 310 U.S. at 242, *with Berger*, 295 U.S. at 84.

[10] *See Young*, 470 U.S. at 19.

[11] *Compare Donnelly*, 416 U.S. at 640-41, *with Caldwell*, 472 U.S. at 339.

[12] This last factor takes on particular significance in a capital sentencing proceeding. Where the jury is determining guilt or innocence, and where the prosecution has presented incontrovertible evidence of guilt, it can more easily be said that prosecutorial misconduct had no effect on the

C. Prosecutors Understand This Court's Caselaw To Be Clearly Established Law On The Limits Of Prosecutorial Argument.

As working prosecutors, *amici* used this Court's holdings to guide their closing arguments, and *amici* believe that prosecutors and state courts nationwide conscientiously are using this Court's holdings to guide their conduct. Indeed, prosecutorial ethical standards largely mirror this Court's jurisprudence. For example, the American Bar Association's Standards for Criminal Justice reflect the core principles that this Court has recognized. Standard 3-5.8 prohibits a prosecutor from "express[ing] his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant," from "mak[ing] arguments calculated to appeal to the prejudices of the jury," and from making "argument[s] which would divert the jury from its duty to decide the case on the evidence." *ABA Standards* 3-5.8 (b)-(d). The American Bar Association Model Rules of Professional Conduct similarly preclude counsel from "assert[ing] personal knowledge of facts in issue" and "stat[ing] a personal opinion" as to the case. ABA Model R. 3.4(e). The reflection of this Court's principles in these ethical standards underscores how "clearly established" this Court's holdings have become in the legal community.

For these reasons, *amici* strongly support respondent's contention that there is a "clearly established Federal law" barring improper closing arguments that extends well beyond

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outcome. But in a capital sentencing proceeding where the jury is using its common sense to make an "individualized inquiry" into all the relevant circumstances, *McCleskey* v. *Kemp*, 481 U.S. 279, 303 (1987), it is much harder to say with assurance that an improper prosecutorial argument had no effect on the outcome. *Compare Darden*, 477 U.S. at 182 (finding no prejudice from misconduct in guilt-innocence phase of capital trial where the evidence of guilt was "overwhelming"), *with Caldwell*, 472 U.S. at 333 (finding prejudice from misconduct in sentencing phase of capital trial).

the three cases mentioned in petitioner's brief. 28 U.S.C. § 2254(d)(1); see Pet. Br. 20-22. This clearly established law informed how *amici* conducted their summations during their service as prosecutors, and it continues to govern the arguments made by prosecutors across the country. This Court should reaffirm its commitment to these reasonable rules that both allow prosecutors to advocate vigorously for their cause and restrain arguments that mislead and inflame, and this Court should make clear that these rules are clearly established Federal law that state courts must faithfully follow.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

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February 26, 2007